

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, et al,  
Plaintiff, No. 1:11cv483

vs.

NCR, INTERNATIONAL PAPER COMPANY,  
WEYERHAEUSER,  
Defendants.

Before:

THE HONORABLE HUGH BRENNEMAN, JR.,  
U.S. Magistrate Judge  
Grand Rapids, Michigan  
January 20, 2015  
Motion for Discovery Proceedings

APPEARANCES:

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January 20, 2015

PROCEEDINGS, 10:11 a.m.

THE COURT: We have a newly devised signup sheet, I see. Certainly makes sense.

I was just handed a stipulation as I walked in resolving the motion I heard it was a week ago Friday, I believe. So I think that one is off the books now. So that's good.

I think I may have mentioned last Friday, for those of who that were here, and we have a slightly changing group of attorneys, that I had the opportunity to fly to London last week. So I wasn't going to work on that one anyway. And I usually don't name drop, but I don't get to fly to London very often, so I thought I would take the opportunity to do that.

So last Sunday, today is, what, Tuesday. Sunday I was at St. Paul's for a church service, and then we left for the airport and on the flight back I was thinking that what an institution that was, and it's been there, along with West Minster Abbey and the tower, places we visited at length, for well over a millennium, almost two millennium. I think of things, what things there are in this country that will ever approach the length of those institutions. And then I checked today's calendar. So as I said, it's good to see you again.

Georgia-Pacific versus NCR, Plaintiff's Motion in Support Or to Determine the Sufficiency of NCR Corporation's

1       Answers and Objections to Plaintiff's First Phase II Requests  
2       for Admissions. I have had a chance to look over the briefs as  
3       well as the disputed requests to admit. As you know, I like to  
4       go through those individually because I think that really gets  
5       to the heart of the issue.

6               But I'll also give the parties a brief opportunity,  
7       and I think it needs to be brief because I do need to leave  
8       before noon today, to summarize their respective positions and  
9       then we will go through those individually. So maybe a quick  
10      five-minute preview of your respective positions would be a  
11      good idea. Counsel.

12             MR. NYFFELER: Thank you, Your Honor. I have a  
13      handout here with some slides that goes through some of these  
14      things. May I approach?

15             THE COURT: Certainly.

16             MR. NYFFELER: Judge, do you want one or two copies?

17             THE COURT: One is fine.

18             MR. NYFFELER: We are waiting for the slide to come  
19      up. All right. It is just teasing me. Sorry, Your Honor.

20             All right. So, Your Honor, very briefly, the law says  
21      that discovery responses must be made in good faith. The law  
22      is also clear that if a responding party plays games, gives  
23      evasive responses, or responses made without bad faith, the  
24      remedy is that these responses should be deemed admitted.

25             After taking NCR's deposition it was clear that NCR

1 had no good faith basis for several of the responses to its  
2 request for admission. If an attorney can refuse to provide  
3 good faith answers to an RFA, then the rule itself has no  
4 meaning. NCR's supplementation after -- sorry, it just keeps  
5 flickering -- let's just forget that for now.

6 NCR has actually submitted a third try after we filed  
7 our motion to try to resolve the issues, but unfortunately it  
8 does not. And, again, NCR lacked a good faith basis for the  
9 responses they gave and the remedy is that they should be  
10 deemed as admitted.

11 So one thing NCR raised in its brief is the issue of  
12 the timing of our motion, and I wanted to briefly go over the  
13 timeline for that.

14 We served these requests on June 26th. On August 14th  
15 NCR responded, then on November 14th we had a 30(b)(6)  
16 deposition of NCR. During a break in the morning of the  
17 deposition, NCR served its first supplemental responses to the  
18 requests. So we had not seen these before the deposition. So  
19 that was -- we asked the witness if he was given sufficient  
20 time to prepare, and he said he was. He said he was ready to  
21 testify on the notice topics, which included the factual basis  
22 for NCR's responses to the RFAs. On November 24th we had a  
23 meet-and-confer and we asked several requests to be admitted.  
24 These are the subject of the motion.

25 NCR said that it would admit responses 2, sorry, 8 and

1 20 without qualification, but it said that it would not admit  
2 without qualification any others.

3 They also wanted --

4 THE COURT: 8 and 20 now moot?

5 MR. NYFFELER: 8 and 20 are moot, Your Honor, yes,  
6 that's correct.

7 NCR then asked to have the opportunity to have a third  
8 attempt to try to respond to these requests because they wanted  
9 to be able to further explain the reasons why, reasons for  
10 their answers. And our response at the time was that the time  
11 for NCR to explain its responses was the 30(b)(6) deposition  
12 when we noticed the topic. However, we made it clear that if  
13 NCR would be willing to serve us a supplement by the following  
14 day at noon, we would be more than happy to consider it and  
15 take it into account before we filed the motion.

16 So that the following day, November 25th, the noon  
17 deadline came and went. We did not receive any documents from  
18 NCR. We gave NCR another hour and a half just to make sure  
19 that they weren't late in sending this, so at 1:30 we actually  
20 sent our response, or filed the motion. At around 7:00 p.m.  
21 that night then NCR served its third attempt to answer these  
22 requests, and no doubt in between they read our brief and made  
23 sure that it matched up to what they needed.

24 And so most of this case law that we have is listed in  
25 the case, or listed in the brief.

1 THE COURT: Why didn't you give them 24 hours instead  
2 of this half day?

3 MR. NYFFELER: Because they wouldn't give us a  
4 specific time as to when they were going to give us another  
5 response. They also had served one supplement already and had  
6 a deposition, and we weren't really sure why we needed to wait  
7 sort of indefinitely to have yet another chance to respond to  
8 these. The time for them to explain their responses was at the  
9 deposition. That was very clear, and we got answers --

10 THE COURT: Isn't the whole purpose of a  
11 meet-and-confer to try to work these things out, and if they  
12 said in fact they were going to give you a new supplement in an  
13 effort to work that out, and try to achieve some kind of  
14 resolution, wouldn't that be something you would want to  
15 achieve?

16 MR. NYFFELER: Yes.

17 THE COURT: I understand if they were vague and said,  
18 sometime in the future, then you wouldn't have achieved  
19 anything. But if they were more specific than that, and said  
20 we're within 24 or 48 hours, seems like it would have been  
21 worth waiting.

22 MR. NYFFELER: Well, it would, Your Honor, except the  
23 problem is that they were very clear in the meet-and-confer  
24 that they were not going to admit without qualification any of  
25 the other responses. We were going to see -- we expected to

1 see some of the same responses where they would admit but, or  
2 deny but, and then they would have qualifications like they  
3 were in the previous answers that really made it difficult to  
4 really understand what it is they were trying to get to.  
5 Moreover, what we expected they were going to try to do is try  
6 to sweep under the rug what their witness had said under oath  
7 when we asked exactly the basis for their responses.

8 So I understand that giving them more time --

9 THE COURT: They couldn't do that, could they?

10 MR. NYFFELER: That's what they are trying to do in  
11 their responses now, in some of them, yes, Your Honor. When  
12 their witness said, when asked like, are you, "What portion of  
13 this are you denying?" The witness said, "I'm not sure." So,  
14 and I have examples we can run through, and that's why I have  
15 the presentation so we can run through and go through these.  
16 But there's a lot of instances where the testimony and their  
17 third try really don't match up.

18 Now, the case law about having to respond to RFAs  
19 being required to be in good faith, a lot of this stuff was  
20 already included in the, was already included in the brief.  
21 But there's one extra case cite that I wanted to add. This  
22 came from the Thalheim case which is a case that we actually  
23 cited, and by the time we filed this we weren't sure if they  
24 were ever going to actually supplement. They hadn't done it by  
25 noon like we asked. And so now that they did, the quote from

1 the Thalheim case I think is indicative. In that case it says,  
2 "Though qualification may be required where a request contains  
3 assertions which are partially true, a reviewing Court should  
4 not permit a responding party to undermine the efficacy of the  
5 rule by crediting disingenuous, hair-splitting distinctions  
6 whose unarticulated goal is unfairly to burden an opposing  
7 party." And the quote then continues. "Nor should a reviewing  
8 Court permit a responding party to frustrate the rule by  
9 initially providing inadequate responses, forcing the  
10 requesting party to file a motion and costly memoranda, and  
11 only then coming forward with amended answers that easily could  
12 have been supplied in the first instance."

13 So, Your Honor, that I think adequately sums up our  
14 position that there's no reason NCR couldn't have given these  
15 answers in the first place. But they did not do so in their  
16 first answer, they didn't do it in their second answer. Their  
17 witness couldn't actually respond or couldn't provide the basis  
18 for a lot of their responses, and for that reason we think they  
19 lacked a good faith basis for the answers that they gave us.

20 THE COURT: All right. Thank you.

21 MR. NYFFELER: Yes, sir.

22 MR. EVEN: Your Honor, Yonatan Even for NCR, and I may  
23 be the only lawyer here who you've never met before. So --

24 THE COURT: Glad to have you here.

25 MR. EVEN: So I would like to be brief as you had

1 asked us to. I think the main issue here is that our initial  
2 responses we believe were sufficient. The rule provides that  
3 all we need to do with a denial is actually deny. No  
4 explanation is needed. The reason we have supplemented for the  
5 30(b)(6) is specifically because the 30(b)(6) witness, while  
6 intimately familiar with some other topics that Georgia-Pacific  
7 wanted to ask about, was not familiar with the topics they have  
8 asked about in the RFAs, and in fact no NCR employee is  
9 familiar with these topics, and so we had to educate the  
10 witness. And in order to minimize the effort with the witness,  
11 we supplemented the reasons for denials, very explicitly and  
12 pretty detailed reasons. And, therefore, we had a witness who  
13 essentially said, this is the supplemental, and this is what I  
14 read, this is what I prepared, and there's nothing more or much  
15 more than I can add beyond that.

16 In terms of the timeline that has gone on, so they  
17 served us in June. We have served our initial responses in  
18 August. We have not heard any complaint about those until five  
19 days after the deposition in November, at which point one of my  
20 associates spoke briefly with Mr. Nyffeler and was told that  
21 essentially they are expecting unqualified admissions to all of  
22 these RFAs. And that Georgia-Pacific is not interested in  
23 anything else. We nonetheless had the formal meet-and-confer  
24 two days later, in which we said --

25 THE COURT: Pardon me just a moment. Is that the

1 basis of the request for unqualified admissions, that the  
2 original responses were untimely?

3 MR. EVEN: Untimely, Your Honor?

4 THE COURT: Yes. More than 30 days.

5 MR. EVEN: Oh, no, no. No. That was not the basis.

6 THE COURT: Okay. Thank you.

7 MR. EVEN: No, Your Honor. Everything was timely, and  
8 I don't think anybody raised a timeliness issue.

9 We had said that at the meet-and-confer that we will  
10 do our best as an accommodation to supplement even more our  
11 responses and said so that it will be done within 24 to  
12 48 hours. Mr. Nyffeler said that they did not receive anything  
13 from us the next day by noon; actually that's not correct.  
14 They have received a letter recapping and summarizing what  
15 happened in the meet-and-confer, and, again, stating that we  
16 will supplement within 12 to 24.

17 Sorry, 24 to 48 hours. We did supplement that very  
18 day.

19 THE COURT: When did they receive your letter?

20 MR. EVEN: I'm guessing a couple of hours before they  
21 filed. It was sent to them by e-mail around 10:00 a.m. in the  
22 morning, I believe, 10 or 11.

23 We then sent them another letter later that day  
24 saying, we have now supplemented, please withdraw your motion  
25 or reconsider, or talk to us if you still have any complaints.

1 They have never even responded to that letter.

2 Now, in terms of the law, Mr. Nyffeler cites a few  
3 snippets from some case law. The simple fact is, as I said,  
4 under Rule 36 in a denial no reasons are needed to be given at  
5 all. They are essentially disagreeing with us with our view of  
6 the evidence, and that's not really surprising, we think. We  
7 think some facts are disputed. They think that their view of  
8 these facts are correct. We disagree. The law is pretty clear  
9 about that, that that's not a proper issue for RFAs. They have  
10 not cited, and I'm not aware of any case, where a denial has  
11 been, has been deemed admitted because one of the parties did  
12 not like the reasons for the denial or thought that the  
13 evidence does not support the denial. I haven't seen one, and  
14 I don't think that's the correct ruling under the law.

15 I think that the case they cite most, I'm going to  
16 fumble this, but I think it's A-S-E-A from the Ninth Circuit  
17 from '81, they quote from it, but the case dealt with a  
18 position where the Court says deeming something admitted is the  
19 most severe sanction that can be. We're very careful with it.  
20 And if somebody said they lacked sufficient knowledge, and  
21 after a fact hearing on that the Court will make an affirmative  
22 finding that they essentially lied about that, they did not go  
23 to that length of, of having a reasonable search, then we will  
24 deem it admitted. I don't think those are the circumstances  
25 here. The circumstances here is that we disagree with our view

1 of the facts, and we'll go through each and every one.

2 The last thing I do want to add before, and my five  
3 minutes are probably up, but there is one, one response that I  
4 have looked at the underlying document last night and we have  
5 said that the document lacks a couple of quotes which in fact  
6 are found in another portion of the document. We will clearly  
7 admit anything that's in the document. We don't think the  
8 document stands for what Georgia-Pacific proposes that it  
9 stands. But our, our objection is going to be slightly  
10 different.

11 And the really last thing is just to know that we have  
12 in our supplemental also admitted, albeit with some  
13 qualification, requests 34, 35, 36. It's not clear to me  
14 whether Georgia-Pacific's position is that those are still at  
15 issue. We would think the motion is moot as to those as well.

16 THE COURT: Why?

17 MR. EVEN: Because they have been admitted. We then  
18 added some context, but they have been admitted.

19 THE COURT: All right. Counsel, is there a quick  
20 answer to that one?

21 MR. NYFFELER: Your Honor, we would be happy to go  
22 through them to get to those numbers to show that it's not  
23 really clear if it's admitted or not.

24 THE COURT: We'll worry about that when we get to it  
25 then.

1 MR. NYFFELER: Yes, sir.

2 THE COURT: Thank you, gentlemen. Let's go to the  
3 first one that apparently is at issue, and I believe that's  
4 number 9. Now, I don't know if there is a particular exhibit  
5 that contains the requests. I know in NCR's brief there is a  
6 number 3. It seems their supplemental responses, that seemed  
7 to be the most recent compendium of answers.

8 MR. NYFFELER: Your Honor, the handout that I just  
9 gave you, page 25.

10 THE COURT: The handout you gave me, which isn't,  
11 that's not before the Court, though, as far as a document in  
12 the court, is it? Court record.

13 MR. NYFFELER: No, Your Honor. It was just to  
14 summarize how I was going to walk through it. But we can take  
15 it however you want.

16 THE COURT: I don't see page numbers on here. Let's  
17 look at something -- it's helpful to have this, but let's look  
18 at something that's been filed with the court for purposes of  
19 the record.

20 MR. NYFFELER: Okay. Your Honor, the last tab, tab B  
21 is Exhibit 6 from our brief, and that is a table which  
22 summarizes the requests, and it includes also some of the  
23 language --

24 MR. EVEN: Your Honor, if I just may, looking at their  
25 brief is not the right document simply because the brief was

1 filed before we filed our supplementals. And so I think  
2 properly before the Court are the last supplementals we have,  
3 we have filed.

4 THE COURT: Is that your Exhibit 3?

5 MR. EVEN: It is I believe our Exhibit 3. And I have  
6 a copy here.

7 THE COURT: I've got your Exhibit 3. As far as  
8 Exhibit 6 to the Georgia-Pacific brief, I have that table but  
9 that does not, as far as I could tell, accurately reflect the  
10 answers given to the request to admit by NCR.

11 MR. NYFFELER: Well, Your Honor, it contains the  
12 language as they existed when we took NCR's deposition.

13 THE COURT: Well, I'm looking at the request to admit,  
14 which is what is at issue here.

15 MR. NYFFELER: That's correct, Your Honor.

16 THE COURT: And it doesn't reflect the answers that I  
17 can see in two instances, and so I gave up with it. I'll give  
18 you an example. If you can help me out. The request to, for  
19 admission number 63, which is one of those at issue, your  
20 Exhibit 6 provides a response and says the supplemental  
21 response provided no change. There hasn't even been a first  
22 supplemental response.

23 MR. NYFFELER: Your Honor, so this response, we filed  
24 this motion and filed this exhibit, NCR had not supplied us  
25 with their third attempt to try to answer. So we couldn't have

1 included it in the exhibit.

2 THE COURT: I see.

3 MR. EVEN: But Your Honor is correct that Exhibit 3 to  
4 our response is the one that includes our most current  
5 responses. Those are the responses that were served the date  
6 of the motion a couple of hours late. To say a few out of the  
7 discovery --

8 MR. SMIT: Your Honor, a housekeeping detail if I can  
9 chime in.

10 THE COURT: I have the highest regard for you,  
11 counsel, but I don't really adopt the procedure of having two  
12 people from one side speak to the same motion because then we  
13 end up having a moving target as far as the other side is  
14 concerned.

15 MR. SMIT: I was just going to tell you the exhibit  
16 number.

17 THE COURT: That much I'll allow, Mr. Smit.

18 MR. SMIT: Exhibit 1 to the plaintiff's brief are the  
19 original responses. Then subsequent to that are the second and  
20 the third, not the third, the second. But Exhibit 1 are the  
21 original responses.

22 THE COURT: I was expecting a lengthier argument.

23 MR. SMIT: No. That's why I said a housekeeping  
24 detail, and it truly was.

25 THE COURT: I'm sorry, I didn't hear the housekeeping

1 detail part.

2 MR. SMIT: It's the thickest document.

3 THE COURT: All right. We have requests to admit and  
4 several supplemental responses. We have two sets of  
5 supplemental responses. And a party is under a duty to provide  
6 supplemental responses when they are called for. In this  
7 instance, the parties had a meet-and-confer as is envisioned by  
8 the rule. That was held on November 24th. There was a letter  
9 on November 25th which is Exhibit Number 2, I believe, to NCR's  
10 brief, that summarizes NCR's understanding of what happened at  
11 that meet-and-confer where they state on several occasions, a  
12 the least three, probably more, that they intend to further  
13 supplement their response as a result of the meet-and-confer.  
14 And they state they are going to do so either that day or the  
15 following day. So it's not some abstract time off in the  
16 future, but it's a concrete period of time. And from the  
17 timeline, apparently they did so that same day. Now,  
18 Georgia-Pacific did not wait to receive those supplemental  
19 responses, it chose instead to immediately file this motion.  
20 They could have waited for one more day to file the motion to  
21 achieve the benefits of the meet-and-confer. But it chose not  
22 to do that.

23 It seems to me that if the meet-and-confer is to have  
24 any benefit, it is that the parties try to work these things  
25 out, and if the other side promises within a reasonable period

1 of time, and particularly expedited period of time, as we have  
2 here, to file additional material, the other side ought to  
3 accommodate them to that extent, particularly when these  
4 requests to admit have been responded to back in August, three  
5 months earlier. These answers have been sitting around for  
6 three months. So the additional day or two seems to hardly,  
7 would hardly have made any difference.

8 Now, the answer given for, by Georgia-Pacific is,  
9 well, they weren't prepared to give unqualified answers, and we  
10 would still be chasing them. But the answers might narrow  
11 things down further, eliminate more of the disputes. Which  
12 after all is the purpose of requests to admit, which is to  
13 narrow the issues. And to the extent that the second  
14 supplemental responses would have done that, they would have  
15 benefited everybody it seems to me for Georgia-Pacific to have  
16 waited a little bit longer based on the representation of NCR  
17 to allow the supplemental answers to be filed. They didn't  
18 file them within that 24-hour period, fine, go ahead, file the  
19 motion.

20 For whatever reason Georgia-Pacific did not want to  
21 give that additional time. It would have been a seven-hour  
22 period here, it seems.

23 But based on all of that, I think that we ought to be  
24 addressing what's now before the Court, and that's the second  
25 supplemental answers.

1           It doesn't seem to me to make a lot of sense to argue  
2           over the sufficiency of answers that have been supplemented,  
3           answers that have since been supplemented. We ought to be  
4           talking about the answers as they stand today. That is the  
5           second supplemental answers.

6           I find those in Exhibit 3 to NCR's brief. And so  
7           those are the ones that we are going to look at. They do not  
8           match up with table 6, or Exhibit 6 of Georgia-Pacific's brief.  
9           And I understand why they don't, although, this brief was  
10          written long after, I guess. I strike that. Strike that.

11          The exhibit handed to me today was written long after  
12          these briefs were written and could have included the  
13          supplemental answers.

14          So what it does do is adopt Exhibit 6 of the original  
15          brief that plaintiffs have submitted. I find that confusing at  
16          this point since it tracks only the original answers and not  
17          any of the supplemental answers. So I'm going to look at  
18          Exhibit 3 which are the requests and the most current answers.

19          Now, with that in mind let's look at number 9, unless  
20          that has now resolved the issue.

21                 MR. NYFFELER: No, Your Honor, we don't believe so.

22                 THE COURT: All right. Then let's proceed.

23                 MR. NYFFELER: Your Honor, since I have a couple of  
24          papers to look at would you mind if I stay here?

25                 THE COURT: That's fine.

1 MR. NYFFELER: Okay. Thank you. So number 9, Your  
2 Honor, the original question asked, "Admit that you told a  
3 federal agency, in April 1971, that NCR was no longer using  
4 PCBs in its carbonless copy paper."

5 In its initial response, talking about the original  
6 response, their response was, "NCR admits that the document  
7 admitted in evidence during the Phase I trial as Trial  
8 Exhibit 1692 states that "NCR has indicated it is no longer  
9 using PCBs in its carbonless copy paper," and refers to the  
10 entire document for additional context.

11 Now, the part we found difficulty with this original  
12 response is the fact that it admits that there is a document  
13 that contains the cited language, but NCR did not deny that it  
14 told a federal agency in 1971 that NCR was no longer using PCBs  
15 in its CCP. So there was not a denial. They did not say that  
16 they conducted a reasonable inquiry and could not admit or  
17 deny. And they did not object to this request. As best we  
18 could see from their original response as we were preparing for  
19 their 30(b)(6) deposition, NCR simply didn't respond to this  
20 request. Now, under the rules, it says if a matter, "matter is  
21 deemed admitted unless 30 days after being served the party  
22 serves a written answer." And since NCR didn't respond, we  
23 believed at that point then that NCR has essentially admitted  
24 the response.

25 Now, when we asked NCR's designee at the 30(b)(6)

1 witness to explain or clarify NCR's response, NCR's counsel  
2 instructed him not to answer as going beyond the scope of the  
3 deposition notice. Now, the original topic for the deposition,  
4 the 30(b)(6) deposition, was, "The reasons for any denial by  
5 NCR of any of Georgia-Pacific's Phase II requests for admission  
6 and the facts that NCR possesses that support NCR's position  
7 that any denied request is not true."

8 Now, at that point NCR's counsel explained that any  
9 request that did not include an express denial was beyond the  
10 scope of the 30(b)(6) notice. In fact, on the record his  
11 statement was, and the request for admission, "was responded by  
12 a response that it's not a denial. Therefore, it's beyond the  
13 scope and I'm instructing the witness not to answer."

14 The problem is is that even if -- so NCR's position  
15 is if it didn't include the word denial, you are not allowed to  
16 ask this witness any questions about it. Even though requests  
17 or responses that say they couldn't admit it or deny or that  
18 they objected would not narrow the issues to be tried. In  
19 fact, Rule 30 requires that Georgia-Pacific must describe with  
20 reasonable particularity the matters for examination. And  
21 Georgia-Pacific believes that NCR's reading of this topic is  
22 unreasonably narrow. But that really doesn't matter, Your  
23 Honor.

24 The case law and the notes to Rule 30 clearly say that  
25 a party may not instruct the witness not to respond except for

1 reasons of privilege, to protect trade secrets, and other  
2 specific, specific areas. Otherwise if they are instructed to  
3 respond it is, it violates Rule 30 and it is potentially  
4 sanctionable. In fact, during the deposition Georgia-Pacific  
5 warned NCR's counsel that he was violating Rule 30, but NCR's  
6 counsel continued to instruct the witness not to answer for a  
7 total of 17 times during the deposition.

8 Now, we raise this issue of improper instructions not  
9 to responds in our brief, and NCR did not deny that its  
10 instructions were improper or even sanctionable. At this  
11 point, at least for this particular request for admission,  
12 since NCR did not respond to the actual language of the  
13 response, we believe it should be just deemed admitted. But at  
14 the deposition if NCR took the position it didn't want to  
15 explain it, then NCR's lost its opportunity to do so.

16 So, Your Honor, I understand that there is a, there  
17 was a supplemental response given. But what this really turns  
18 on is what are the bases for the responses that NCR as an  
19 entity gave to us and what did their witness say those bases  
20 were. And what we have is a problem because the witness when  
21 we questioned him on those bases could not explain the vast  
22 majority of the responses that we have as the subject of this  
23 motion.

24 So if NCR wished to supplement --

25 THE COURT: Aren't you conflating a motion to

1 determine the sufficiency of an answer to a request to admit  
2 with some sort of a motion to determine the sufficiency of a  
3 Rule 30(b)(6) deposition? And that's not before the Court, I  
4 don't believe.

5 MR. NYFFELER: No, Your Honor. In fact, we actually  
6 think, according to the witness, he said he was prepared, he  
7 said he was ready to testify on the topics. So we're accepting  
8 him at his word that that's the case. But the fundamental  
9 problem is that when a party responds to a request for  
10 admission they have to do it in good faith and they have to  
11 have a reason for their denials or admit that they cannot admit  
12 or deny. And when we actually asked NCR what those points  
13 were, NCR was unable to say any basis for the denials or the  
14 positions that they gave.

15 THE COURT: But that doesn't address my question. Or  
16 perhaps I should ask my question differently. What is the  
17 purpose of a motion to determine the sufficiency of a response  
18 to a request to admit? Is it to determine the veracity or the  
19 truth of the answer?

20 MR. NYFFELER: No. It's not to determine the truth of  
21 the matter.

22 THE COURT: Well, isn't that exactly what you're  
23 trying to do by pointing out that their witness isn't able to  
24 support the denial -- or the admission and, therefore,  
25 obviously they gave the wrong answer?

1 MR. NYFFELER: Well, Your Honor, it comes back to the  
2 Asea case that counsel mentioned. In that case the defendants  
3 responded to RFAs by stating that it could not admit or deny  
4 because it made a reasonable inquiry and the information known  
5 or readily available at this date is not complete. Following  
6 the depositions in the case, it became clear that the  
7 defendants could have actually admitted or denied the request,  
8 actually had the information they needed but their response  
9 said that they could not. And at the motion hearing the  
10 defendants argued that their responses could not be deemed  
11 insufficient because as written their responses complied with  
12 Rule 36. And the Ninth Circuit ruled that a response that  
13 contained the necessary and proper language from Rule 36 could  
14 still be deemed admitted if the response was not made in good  
15 faith.

16 And as Mr. Even pointed out, for example, if a  
17 response could state that a reasonable inquiry was made and  
18 information known or readily obtainable was insufficient to  
19 enable the party to admit or deny, that on its face, that  
20 statement, would be sufficient to satisfy Rule 36.

21 However, if it was later discovered that a reasonable  
22 inquiry was not made, or if information known or readily  
23 obtainable was sufficient to enable the party to admit or deny,  
24 then the Court has the discretion to deem those responses  
25 admitted.

1           It's a case where you can deny something but you have  
2           to be able to explain, you have to be able to a good faith  
3           basis for the denial.

4           What NCR, as far as I can tell from their responses,  
5           NCR takes the position these requests are painful, they will  
6           hurt our case so I'm going to deny them. Even though in many  
7           cases there is no -- it's beyond dispute as to whether the  
8           particular facts or the admission is correct. They just don't  
9           want to admit it.

10          And so the issue -- like they want to ignore the fact  
11          that they don't have to respond in good faith, they want to  
12          ignore the fact that their own 30(b)(6) designee could not  
13          explain any basis for the responses that they gave. This would  
14          ignore all that. And put it fast forward and say we have  
15          written this answer signed by our lawyers, not under oath, that  
16          will replace all the explanations given by the witness.

17          All right. So if we turn back to NCR's --

18          THE COURT: Well, the witness is basically parroting  
19          what is prepared for him in the binder that the attorneys have  
20          prepared.

21          MR. NYFFELER: Well, he is testifying on behalf of NCR  
22          and what its positions are, right.

23          THE COURT: Right. Well, nobody knows the answers to  
24          what took place 40 years ago, so the attorneys researched all  
25          this, put together a binder, and had a witness review the

1 binder as they are obligated to do so they would have somebody  
2 who could testify on behalf of NCR. Isn't that what happened?

3 MR. NYFFELER: That's my understanding, yes.

4 THE COURT: All right. So he is basically parroting  
5 back what this binder of information has in it, and that's the  
6 extent of what he can testify to. Isn't that right? Isn't  
7 that what he testified to?

8 MR. NYFFELER: I believe that's what -- yes. But,  
9 but the notice of the topic was what NCR's bases were for the  
10 responses.

11 THE COURT: He can't testify to anything more than  
12 what is in the binder, isn't that what he testified to?

13 MR. NYFFELER: He may have testified to that, but  
14 that's not what -- we didn't ask for a binder. We asked for  
15 someone that could explain this. Explain the basis for the  
16 responses.

17 THE COURT: All right. But he testified that as far  
18 as what he could testify to, it was limited to the parameters  
19 of the binder.

20 MR. NYFFELER: That's correct.

21 THE COURT: All right. And NCR is taking the position  
22 that what they know is in that binder.

23 MR. NYFFELER: Yes.

24 THE COURT: So basically he's verbalizing what they  
25 know in that binder.

1 MR. NYFFELER: Yes.

2 THE COURT: And they say in their answer, "NCR has  
3 conducted a reasonable inquiry, and based on that inquiry, NCR  
4 is aware of additional evidence concerning such purported call  
5 or the contents thereof and therefore lacks knowledge or  
6 information sufficient to admit or deny this Request."

7 MR. EVEN: Just, Your Honor, to correct the record. I  
8 believe it says unaware. I believe you said aware. We stated  
9 that we're unaware of anything in addition.

10 THE COURT: I would be flippant and say it's close  
11 enough for government work, but I think that would turn the  
12 case upside down if I said that. You are correct. I stand  
13 corrected.

14 "NCR is unaware of additional evidence concerning such  
15 a purported call or the contents thereof and therefore lacks  
16 knowledge or information sufficient to admit or deny this  
17 Request."

18 So whether there's a list that says what is compared  
19 to is in the book or you look at the book itself, that's the  
20 extent of their knowledge, that's what they're saying the  
21 extent of their knowledge is.

22 MR. NYFFELER: Correct.

23 THE COURT: And they have looked further, and they  
24 don't have any further knowledge.

25 MR. NYFFELER: Well, hang on just one second, though,

1 Judge. Because this, this statement about NCR's conducted a  
2 reasonable inquiry. That was only added in the, in the second  
3 supplemental response.

4 THE COURT: That's the one we are dealing with.

5 MR. NYFFELER: I understand. But in their first  
6 response, they had not conducted an inquiry. Their second  
7 response they had not conducted an inquiry. And in the  
8 deposition as their responses stood, they still hadn't  
9 conducted a reasonable inquiry.

10 THE COURT: We are dealing with this response which  
11 says they have.

12 MR. NYFFELER: Right. Bear with me one moment. But  
13 additionally, Your Honor, their original response did not say  
14 they couldn't admit or deny. And by the way, this actual  
15 response is about three months after they filed their first  
16 one. And so they have 30 days to file a response, and we tried  
17 to get them to clarify this answer and they refused.

18 THE COURT: Well now they have so that's what we are  
19 dealing with.

20 MR. NYFFELER: All right.

21 THE COURT: All right. What's the response from the  
22 other side as to number 9?

23 MR. EVEN: I think the response speaks for itself,  
24 Your Honor. I think what we have is sort of, I feel like  
25 Georgia-Pacific is trying to have a gotcha moment that maybe

1 our witness wasn't eloquent enough in explaining, was not  
2 eloquent enough in explaining what then found its way into the  
3 admission. And what he said basically is, as Your Honor  
4 stated, I can't really add much beyond what's in the written  
5 responses because it did not have any personal knowledge.

6 THE COURT: I couldn't hear the very last thing you  
7 said. Say the last thing again, please.

8 MR. EVEN: What I said was that he did not have any  
9 personal knowledge of these things, and so what he stated when,  
10 when he was asked about an actual denial, and by the way I  
11 think 9 was not an actual denial, but when asked about an  
12 actual denial, he stated I can't add much or I can't add  
13 anything beyond what's in the responses. And in this response  
14 we tried to capture it even more clearly. What they say is we  
15 have a document that's not an NCR document. Even if it were,  
16 I'm not sure that would convince us, but it's not an NCR  
17 document. It refers to some call with an NCR person who we  
18 have never managed to locate or interview, or depose. I  
19 suspect he is no longer with us. And based on that, we are, we  
20 are not aware of any other evidence, as we say, and therefore,  
21 we are neither, we are not in a position to admit or deny that  
22 that statement was made to the government back in April 1971.

23 I think the response fully complies with Rule 36 and  
24 probably goes a little beyond what one typically sees in an RFA  
25 response.

1           And just one last point. To try and somehow compare  
2           that to Asea where it was found that people have lied when they  
3           said that, I really don't see the comparison.

4           THE COURT: All right. Well, Rule 36 provides that,  
5           "The answering party may assert lack of knowledge or  
6           information as a rule," as, I'm sorry, "as a reason for failing  
7           to admit or deny, only if the party states that it has made  
8           reasonable inquiry and that the information it knows or can  
9           readily obtain is insufficient to enable it to admit or deny."

10          Here NCR states it is unaware or -- well, what  
11          happens here happens with virtually all of the answers that are  
12          at issue here. And that is that their response, admission,  
13          denial, or claim of lack of knowledge sufficient to make an  
14          admission or denial, is put in the last phrase of the answer  
15          rather than at the outset where it might be clearer. That's  
16          the way the answer is drafted. So what this answer could, is  
17          really saying is, the respondent lacks knowledge or information  
18          sufficient to admit or deny this request except insofar as NCR  
19          admits that the, that a document admitted into evidence during  
20          the Phase I trial as Trial Exhibit 1692 states that, and then  
21          there is the quote, "cites to a purported call of Mr. Overlay  
22          of NCR. NCR has conducted a reasonable inquiry, and based on  
23          that inquiry, it is unaware of additional evidence concerning  
24          such purported call or the contents thereof." Overlay, in  
25          other words, it says we don't have the knowledge or information

1 sufficient but we have made an inquiry based on what evidence  
2 was available to us, and that has not enabled us to go any  
3 further. Thus showing we have made an inquiry from evidence  
4 that was made known to us, or was readily obtainable to them.

5 We'll come back to 9, but I think we're going to see  
6 that same pattern throughout the rest of the questions,  
7 particularly where there are denials.

8 MR. NYFFELER: Your Honor, may I add one point to  
9 this?

10 THE COURT: Yes.

11 MR. NYFFELER: The problem with the response as  
12 written, it says we have a document which states the  
13 information that's the basis of GP's request. They did an  
14 additional search, and they found nothing to support or refute  
15 it. So if they had done the search and they have a document in  
16 hand that says what we asked, then they have no way to refute  
17 it, how can they say they can neither admit or deny? But what  
18 would they require to admit it? They said they couldn't find  
19 Mr. Overlay, they said they couldn't talk to him. We have a  
20 document in front of us that says what it says. And, Your  
21 Honor, this is the kind of stuff that we hope to get a  
22 clarification out of them at the deposition, and they refused  
23 to let us talk to him.

24 THE COURT: But I take it it is not their document.

25 MR. NYFFELER: No, it is not their document.

1 THE COURT: But you want them to take the position  
2 that somebody else's document, which appears to be the only  
3 item that addresses this issue, is one they should either admit  
4 to or deny without any other information.

5 MR. NYFFELER: Well, this document is in evidence,  
6 Your Honor, and --

7 THE COURT: I know it's in evidence.

8 MR. NYFFELER: Right. But there is nothing to refute  
9 it.

10 THE COURT: Are they obligated to then admit that it's  
11 true because nothing refutes it? Is that your position?

12 MR. NYFFELER: No. Actually in this case, Your Honor,  
13 we would, we would have asked them at the deposition what their  
14 basis for saying they couldn't admit or deny, or what it is  
15 that they required in order to admit or deny. And that was the  
16 information that they refused to let us have.

17 THE COURT: Counsel, I'll let you respond to that.  
18 Apparently there is one document in evidence that addresses  
19 this. Nothing else is in evidence that addresses it, so  
20 therefore it hasn't been refuted.

21 MR. EVEN: There are many, and this is something that  
22 goes throughout our phase, Your Honor, and we respectfully  
23 disagree with their view of things where if there isn't  
24 anything that refutes it that we can find from 40 to 60 years  
25 ago, that means that, ergo, that thing is true. Which is we

1 don't think that's the case. There have been depositions in  
2 this case, there have been depositions with many of the people  
3 who wrote many of the documents in this case, and certainly  
4 there are things where, you know, it's not like we haven't  
5 admitted anything in these RFAs. If there is a document that  
6 is more recent such that we know who wrote it, or we have  
7 spoken to the person who wrote it, or this is clearly an NCR  
8 admission because it's a document from an NCR high up or  
9 anything like that, that is very clear that it's an undisputed  
10 fact, we will admit it. And we have admitted it. We are not  
11 going to, we don't feel obligated to admit something because  
12 there is one piece of evidence that may support it, and any  
13 other evidence on it does not exist in this record of 40 to  
14 60 years ago.

15 I don't think there is a rule that obligates us to  
16 admit such a thing. I'm not aware of one.

17 THE COURT: I think the, I think NCR has the better of  
18 the argument. He asked to admit the existence of the document,  
19 but to the extent the document supports the entire argument,  
20 I'm not, I'm not aware that he has to admit the, the entire  
21 argument is true merely because the document hasn't been  
22 refuted.

23 I'm going to hold that the answer to number 9 is  
24 sufficient.

25 What's the next one? Number 20.

1 MR. NYFFELER: I believe 20 has already been admitted,  
2 Your Honor.

3 THE COURT: I apologize. Number 21 -- I'm sorry,  
4 number 31.

5 MR. NYFFELER: Yes, Your Honor, so number 31 if --

6 MR. EVEN: 31 just to, if I may, just to remind Your  
7 Honor. 31 is the one that I mentioned in my opening remarks  
8 that there are some statements that we said we thought that are  
9 not in the document. I have read the document again last  
10 night. There are a couple of statements that are in the  
11 documents, and obviously we'll admit anything that's in the  
12 documents.

13 MR. NYFFELER: All right. I'm going to have to come  
14 back to what Mr. Even said to make sure I understand it.

15 THE COURT: I'm not sure what -- are you changing  
16 your response to number 31?

17 MR. EVEN: Well, I have seen that the document does  
18 state something to the effect of the inventory of both jobbers  
19 and printers throughout the country, and so that statement is  
20 supported by the documents. I still don't think that the  
21 document shows that NCR was aware of such facts, and that's  
22 about it. So we'll admit the document says what it says.

23 THE COURT: Were you not prepared to admit that  
24 before?

25 MR. EVEN: No, I wasn't prepared that there were a

1 couple of cites here that we fumbled in the scramble to produce  
2 these supplementals, I guess. And we thought the document  
3 doesn't say something, and it turns out it does say it on  
4 another page that we somehow missed.

5 THE COURT: Looking at your response in Exhibit  
6 Number 3 to your brief, what words would you change, if any?

7 MR. EVEN: I think --

8 THE COURT: Do you need to break to figure that out?  
9 We will take a five-minute break.

10 THE CLERK: All rise, please. Court is in recess.

11 (Recess taken, 11:09 a.m.; Resume Proceedings, 11:16  
12 a.m.)

13 THE COURT: Referring to the answer to number, is it,  
14 31?

15 MR. EVEN: Yes. It is 31, Your Honor. I've looked at  
16 it again. I think the document speaks to residual amount.  
17 They speak to some amount. I'm not sure that's entirely the  
18 same thing. But I don't think this is worth the fight, and so  
19 I think I'll admit that at this point.

20 THE COURT: So it's a simple admission.

21 MR. EVEN: I think we'll -- we'll add the usual  
22 language that refer to the entire document for additional  
23 context, because there is additional context there.

24 THE COURT: I don't know what that means.

25 MR. NYFFELER: Neither do we, Your Honor.

1 THE COURT: Are there other ones you're going to have  
2 this difficulty with?

3 MR. EVEN: No, Your Honor.

4 THE COURT: We'll hold 31. As we run over, we're  
5 going to have to do this later this afternoon sometime, and  
6 perhaps the two of you can work this out.

7 What's the next one, 32?

8 MR. NYFFELER: Yes, Your Honor.

9 THE COURT: All right. Let's go to 32.

10 MR. NYFFELER: Your Honor, this involves the same  
11 document. It's an excerpt from the same document. And I don't  
12 know if Mr. Even said this was in the same category of ones  
13 that he was considering changing. I don't really remember.

14 MR. EVEN: I said there aren't any others that we are  
15 considering changing.

16 MR. NYFFELER: All right. Okay. Your Honor, the  
17 issue here with this one is the language from this particular  
18 request came out of Trial Exhibit 1621. NCR asked us for the  
19 factual basis for this before they responded. We told them  
20 that the basis for this was Trial Exhibit 1621. NCR now says  
21 that the document admitted in evidence contains the quoted  
22 language, but then it says it doesn't support the other  
23 allegations.

24 But the issue here is, and again, they say now they  
25 have conducted a reasonable inquiry, not aware of any other

1 evidence supporting the allegations. So deny all other  
2 allegations.

3 The problem we have here is that, again, this  
4 particular document is an NCR document, and we have a document  
5 stating what is the basis for the request, and we don't  
6 understand how this is contested because we're not, because NCR  
7 says they have looked and they find no other evidence.

8 So that's the basis for that. One second. And  
9 during, during the deposition, we tried to actually figure out  
10 what it was these "denies all other allegations" meant. They  
11 essentially admitted the document says what it says but we are  
12 not going to admit to what you have asked. And we asked in the  
13 deposition, "Now turning to request for admission number 32.  
14 Can you tell me whether NCR denies any allegations in request  
15 number 32? Answer, Can I ask my counsel something?" I said  
16 no. Mr. Even, said no. The answer then or the designee says,  
17 "Can you repeat the question, please?" The record was read.  
18 And then the witness for NCR said, "I don't know."

19 So we have a situation here where the witness comes  
20 forward -- the answer originally said there's a document, but  
21 we are going to deny the remainder, but NCR as an entity  
22 doesn't understand what it's denying. And if it doesn't  
23 understand what it's denying, how is that a good faith response  
24 to our request?

25 THE COURT: NCR.

1 MR. EVEN: So two things: First, you know,  
2 Mr. Nyffeler tries to equate the witness with NCR, and I  
3 understand it's a 30(b)(6) witness, but as I've said, the  
4 witness knew what he knew, and referred to the documents for  
5 anything else.

6 As to the specifically to the request for admission,  
7 the problem with their request for admission as we see it is  
8 that it tries to do more than the document does. And we're not  
9 walking away from the document. But the document, the request  
10 says, "you were unable to determine the quantity," which  
11 suggests that we made an effort to determine, did something to  
12 try and do that. The document doesn't say that. The document,  
13 it says, gives some, one person's estimation that, "it is  
14 almost impossible to determine the quantity and location of  
15 such stock." And we admitted that statement. We don't know of  
16 any evidence supporting the allegation that we tried and  
17 failed, or tried at all. And so we lack sufficient knowledge  
18 essentially to admit or deny this. And --

19 MR. NYFFELER: Wait, I'm sorry.

20 MR. EVEN: That's where we are, I think. And so we  
21 deny everything else in there and we admit that portion that  
22 really is written in the document, which is there was a guy at  
23 NCR who wrote that it's nearly impossible. But that's very  
24 different I think from you're unable to determine. You as an  
25 entity, as opposed to one guy's internal writings about his

1 thoughts.

2 MR. NYFFELER: If I may, Your Honor. I just --

3 THE COURT: Quick response.

4 MR. NYFFELER: I want to make sure I understand this.  
5 Mr. Even just said that they lack sufficient information to  
6 admit or deny it so we denied it. But like that's not what the  
7 response says. Response says they deny all other allegations.

8 MR. EVEN: If that's what I said, I apologize, Your  
9 Honor. What I meant it lacks any information supporting that.

10 THE COURT: Again, I see what's happening here, and  
11 again it's the way the answer is drafted. I think technically  
12 it's correct, but I think it's drafted in such a way that it  
13 sends you off in the wrong direction. Because at the very  
14 beginning it says, "NCR admits." So it sounds like an  
15 admission, but this is not an admission. You really need to go  
16 to the last sentence of this response, and it says, NCR denies  
17 all allegations in request number 32. But it qualifies it. It  
18 qualifies the denial. And, in fact, if you look at Rule  
19 36(a)(4), a denial -- a party may deny an answer, or a  
20 request, but a denial must fairly respond to the substance of  
21 the matter, and when good faith requires that a party qualify a  
22 denial, or only part, not only part of a matter you have to  
23 give a reason why.

24 And that's what they are doing here. In fact, an  
25 answering party may assert a lack of knowledge or information

1 as a reason for failing to admit or deny if they make a  
2 reasonable inquiry.

3 So you go to the very last part, and it says, they  
4 deny the allegations except insofar as there is a document  
5 here. And they are not going to deny the existence of that  
6 document. That's the document in evidence in Phase I which is  
7 identified as 1621. So they acknowledge the existence of the  
8 document and they deal with the document. But aside from  
9 dealing with the document, they say they have conducted a  
10 reasonable inquiry and based on that inquiry, they are not  
11 aware of any other evidence supporting the allegations in the  
12 request for admission number 32.

13 So they have answered number 32 by denying it, but  
14 with a good faith qualification. But you have to read it from  
15 back to front but then it makes sense. At least that's the way  
16 I'm reading it. And I think it's an adequate answer.

17 Number 33.

18 MR. NYFFELER: Okay, Your Honor. Request to admit 33  
19 requests NCR to "Admit that it never notified any recycling  
20 mill, prior to 1976, that some carbonless copy paper or CCP  
21 produced before April 1971 was produced using an emulsion  
22 containing PCBs."

23 Now, NCR's first response was that it was denied. The  
24 second response added some documents, and their third response  
25 added some more documents and also makes the following

1 statement: It says that, "At the very latest, the mills knew  
2 of the presence of PCBs in carbonless copy paper as of summer  
3 or fall of 1970, when NCR discussed the presence of PCBs with  
4 paper mill trade organizations, including at least the Boxboard  
5 Research and Development Association, which is the BRDA, and  
6 the American Paper Institute, API."

7 So during the deposition -- well, let me back up. If  
8 NCR has denied that it didn't tell any paper mills, that it  
9 should be a fairly simple exercise for NCR to name one mill  
10 that it told. And during the deposition, we asked that  
11 specific question, and NCR could not name a paper mill that it  
12 told. In fact, when we pressed, NCR's designee pointed to  
13 Trial Exhibit 4418, which is the press release from the BRDA.  
14 But NCR's witness then acknowledged that NCR did not release  
15 this press release, the BRDA did. And in fact, the only  
16 evidence that NCR could point to was this alleged disclosure to  
17 trade organizations.

18 The problem is, Judge, we asked them about paper  
19 mills, not about recycling, not about trade organizations. And  
20 their latest response still talks about these trade  
21 organizations. But to date, they have never been able to point  
22 to any paper mill that they actually told.

23 And if they can't --

24 THE COURT: Thank you.

25 MR. EVEN: So I think, Your Honor, this is maybe the,

1 another example of what we have discussed before. Our initial  
2 response was just denied, which is sufficient under the rules.  
3 We have then supplemented it because, as we said, we put  
4 somebody who doesn't know anything about this before them for a  
5 deposition with a binder. We wanted to give the explanation,  
6 and we have now supplemented it more. The point is even if we  
7 had no evidence of ever telling a mill, still I don't think we  
8 are under any obligation to admit that. That has something to  
9 do with the burden of proof in this case. But be that as it  
10 may, we think there's a host of evidence in this case that  
11 suggests that we did, including one of the documents that's  
12 cited in the response, now actually is a statement or a  
13 discussion with Kimberly Clark, which is a recycling, had a  
14 recycling mill at that time in the Fox River that discusses  
15 specifically that. We have patents that disclose PCBs, we have  
16 the correspondence with the Boxboard Research and the API,  
17 which Mr. Nyffeler may say that's not a mill, but that's a  
18 trade organization that's made up of mills. So if I write to a  
19 trade organization that is made up of mills, then I would  
20 consider that a communication with mills.

21 And putting all that to the side, the fact that I 40  
22 to 60 years later cannot find a document where I wrote to  
23 Mr. Nyffeler's clients specific mill, doesn't mean that I have  
24 to admit that I did not. I don't think there is any rule that  
25 compels me to do that. There may be a -- an evidentiary

1 problem but that doesn't mean that that did not happen or that  
2 I have to admit that that did not happen. And I think what  
3 Georgia-Pacific is trying to do here is contrary to what RFAs  
4 are for. RFAs are for narrowing the issues on something that  
5 is either undisputed or that plaintiff can very easily prove.  
6 I could just as easily file an RFA on them, you know, prove  
7 that, or admit that I haven't told the Kalamazoo mill. I don't  
8 think they have any evidence of that either. It's just a way  
9 of, the nature of the beast of trying something that has  
10 happened 40 to 60 years ago.

11 MR. NYFFELER: Your Honor, very briefly.

12 THE COURT: Very.

13 MR. NYFFELER: Like Mr. Even said, you know, he said I  
14 don't want to admit this. I may have an evidentiary problem to  
15 actually establish the contrary. But I don't want to admit  
16 this. I'm not aware of a rule that says I have to. The  
17 purpose of RFAs is to narrow the issues that are contested.  
18 And right now, we have evidence on one side, we asked NCR what  
19 their basis was to refute it, and they didn't have any.

20 MR. EVEN: I'm sorry, Your Honor, they don't have any  
21 evidence that I have never told anyone. What they have is  
22 maybe a lack of evidence. I think that the evidence we cited  
23 is more than sufficient, and I would be happy to give Your  
24 Honor the one document that is actually correspondence with a  
25 mill about that. And that's back from 1959. That's

1 NCRKZ000224297 that's cited in the response.

2 MR. NYFFELER: Was that --

3 MR. EVEN: That's before Your Honor.

4 MR. NYFFELER: Was that in the witness binder for the  
5 30(b)(6) witness?

6 MR. EVEN: I presume it was. Though, I don't recall.  
7 It is in the response, though.

8 THE COURT: That is one of the documents listed in  
9 your answer, I believe.

10 MR. EVEN: Yes, it is.

11 THE COURT: Again, the purpose of the motion to test  
12 the sufficiency of an answer is not to determine the  
13 truthfulness of the answer or to challenge the veracity of the  
14 answer. It's to determine the sufficiency of the answer as to  
15 whether or not it's been properly answered in the sense of  
16 being admitted or denied. This has been clearly denied. And a  
17 denial in good faith requires you can qualify the answer. And  
18 they have qualified this at length. But they have denied it.  
19 And if this is going to be contested at trial, and you show  
20 this denial is unfounded, you collect attorney's fees for that.

21 So that becomes an issue at trial. They will have to  
22 pay the costs of proving that at trial since they have taken  
23 the position it's denied.

24 All right. 33 is okay.

25 MR. NYFFELER: 34 I think is the next one.

1 THE COURT: It is.

2 MR. NYFFELER: All right.

3 THE COURT: We'll be going until about no later than  
4 -- I want to say ten to but I always end up not adhering to my  
5 own rules. So it will be five to before we leave. Then I have  
6 a meeting on the other side of town. I'll be back by 2:00  
7 o'clock. I have two more matters until 3:00 o'clock, a plea  
8 until 4:00 o'clock. So if we don't resolve this matter by noon  
9 today, or five to 2:00 o'clock, I'll see you all back at 4:00  
10 o'clock this afternoon, or tomorrow morning sometime.

11 MR. NYFFELER: Okay. All right. So 34, "Admit that  
12 NCR never notified any recycling mill that some carbonless copy  
13 paper produced before April 1971 should not be recycled."

14 Their latest response, "NCR admits this Request as to  
15 the mills on the Kalamazoo River, but notes that the mills on  
16 the Kalamazoo River were themselves aware of the presence of  
17 PCBs in carbonless copy paper produced before April 1971, and  
18 such information was in the public domain."

19 The problem we have with this, Your Honor, is we don't  
20 understand what the note is for. There is no provision in Rule  
21 36 that allows them to add like descriptive notes.

22 THE COURT: Thank you. What's your answer?

23 MR. EVEN: I believe the rules allows me to add  
24 context where context is due.

25 THE COURT: What part of the rule are you pointing to?

1 MR. EVEN: I believe the rule says that it speaks to a  
2 denial must surely respond. And then it says, "good faith  
3 requires that a party qualify an answer or deny only a part of  
4 a matter, the answer must specify the part admitted and then  
5 qualify or deny the rest." And this is a qualification that  
6 adds context to our admission. But we are after all admitting  
7 it at least to the Kalamazoo mills, which I think is all that's  
8 necessary here.

9 MR. NYFFELER: Let me know when you're ready for me to  
10 respond, Judge.

11 MR. EVEN: And this is (a)(4), of course, if I did not  
12 say that of the rule.

13 THE COURT: Briefly.

14 MR. NYFFELER: Just simply, Your Honor. It says that  
15 when good faith requires a party qualify an answer. The points  
16 that they raise about that a party.

17 The mills's knowledge or information in the public  
18 domain, that is not required as part of their response. There  
19 is no need to have this quote, unquote, "note." The question  
20 is if I were to tell the Court that they admitted 34, can I say  
21 that they admitted 34 or do I have to include their note?

22 THE COURT: All right. The rule, the rule read in a  
23 more complete fashion states that, "If a matter is not  
24 admitted, the answer must specifically deny it or state in  
25 detail why the answering party cannot truthfully admit or deny

1 it." It then goes on, "A denial must fairly respond to the  
2 substance of the matter; and when good faith requires that a  
3 party qualify an answer or deny only a part of a matter, the  
4 answer must specifically specify the part admitted and qualify  
5 or deny the rest." That part about qualification in part does  
6 not apply to the admission. That only provides if a matter is  
7 not admitted. When it's admitted, it's admitted. And it  
8 doesn't allow the other side to then go ahead and present  
9 counter veiling arguments. Too often people don't like the  
10 fact that a naked fact may seem incriminating, kind of like a  
11 person who is being accused of someone causing an accident on a  
12 weekend because they are drunk, and the other side says, well,  
13 admit that you were sober on Wednesday, to imply that you  
14 weren't sober on the weekend. And they want to say, well, yes,  
15 I was sober all seven days. But you don't get to that say.  
16 Admit, yeah, I was sober on Wednesday. The answer is I admit.  
17 And if you don't, if you think the inference is going to be  
18 read to the jury and they are going to draw an inference from  
19 that, then you present other proofs to say that you were sober  
20 the other six days as well. But you don't get to say that in  
21 your answer to a request to admit. That's what people try to  
22 do.

23 So as far as number 34 is concerned, the appropriate  
24 answer is admit and then strike anything after the admission as  
25 surplusage.

1 MR. NYFFELER: Your Honor, number 35.

2 THE COURT: 35 is the same.

3 MR. NYFFELER: Same.

4 THE COURT: If anybody wants to argue a different  
5 point, the same.

6 MR. NYFFELER: No, Your Honor.

7 THE COURT: NCR.

8 MR. EVEN: The only thing I would add to this, Your  
9 Honor, is I do believe the qualification for the Kalamazoo  
10 mills is both appropriate here and happens to be true because  
11 we have not even attempted, let alone found, that nothing like  
12 this was done outside the Kalamazoo mills. I think that's the  
13 only issue that's under Rule 26 here anyway in this case.

14 THE COURT: This lawsuit is about the Kalamazoo --

15 MR. EVEN: I agree. That's why I think that  
16 qualification is important. I don't want to seem like NCR has  
17 done a complete search for anywhere else in the country.

18 THE COURT: These requests to admit are only good in  
19 this case.

20 MR. EVEN: I understand that, Your Honor.

21 THE COURT: All right. 34 and 35 are surplusage, will  
22 be stricken, and they are simply admitted. That leaves us at  
23 number 36.

24 MR. NYFFELER: 36. Your Honor, 36 is very similar.  
25 The only, one of the main reasons we raise this is because

1 originally their answer said that they object to this request  
2 because it is based on a false premise. Now they say they  
3 admit the request as to the Kalamazoo mills but notes that it  
4 is based on a false premise. And we tried to find out what  
5 this objection was based on, but during the deposition we were  
6 told we are not allowed to ask any questions about it because  
7 it wasn't a denial.

8 THE COURT: Again, this is one of those instances  
9 where NCR may not have had a reason to notify somebody so they  
10 didn't do it. And they would like to explain why. Fine. They  
11 have their opportunity to do that at trial.

12 MR. EVEN: That is fine, Your Honor. I think this  
13 goes in line with 34 and 35.

14 THE COURT: 36 is admitted and the surplusage is  
15 stricken. 37.

16 MR. NYFFELER: Right. So 37 the issue we have with  
17 this, they have added an answer where NCR admits -- let me  
18 back up. "Admit that, prior to 1972, NCR encouraged and  
19 facilitated the recycling of carbonless copy paper." They now  
20 talk about, they admit that they sold carbonless copy paper  
21 Broke or trim. "NCR has conducted a reasonable inquiry, and  
22 based on that inquiry, NCR is unaware of any facts supporting  
23 all other allegations in Request Number 37, including that NCR  
24 "encouraged" or "facilitated" the recycling of carbonless copy  
25 paper. All other allegations in Request Number 37 are

1       therefore denied."

2               The problem we have with this one, Your Honor, comes  
3       back to the deposition. We tried to get to an understanding of  
4       exactly what it was about this they were denying when they said  
5       that we deny the remainder. And their witness said, so we  
6       asked, "Does NCR deny that it was, that it encouraged the  
7       recycling of carbonless copy paper?" The deponent said, "I'm  
8       not sure. Does NCR deny that it facilitated the recycling of  
9       carbonless copy paper at any time? I'm not sure. Does NCR  
10      deny that prior to 1972 it encouraged the recycling of  
11      carbonless copy paper?"

12              THE COURT: Don't they answer that here with their  
13      most recent answer that we are dealing with today?

14              MR. NYFFELER: Well, the only point is, Your Honor,  
15      that their witness under oath said he didn't know.

16              THE COURT: Response.

17              MR. EVEN: As I said before, to the extent the witness  
18      didn't know, I think that is clarified in the supplementals,  
19      and, you know, if there was any, anything insufficient in the  
20      preparation of the witness, I do apologize. But I think  
21      Georgia-Pacific knows what our position is based on the current  
22      responses that we filed. That was exactly why we told them  
23      because of responses like that that they should wait for the  
24      additional responses. The response is now deny, explain what  
25      it is that we think we did do, and that's qualification that,

1 Your Honor, agreed that is allowed in a denial. But  
2 essentially these are denied, then, you know, we see the facts  
3 differently from them. We think we did not encourage or  
4 facilitate. They may think differently, and they can try and  
5 prove that.

6 THE COURT: I think there is a general rule that a  
7 party, that a particular deponent cannot file an affidavit  
8 after he has been deposed under oath contradicting his sworn  
9 deposition. This really isn't the same thing. First of all,  
10 they have talked about the fact that this 30(b)(6) deposition  
11 witness only knows what NCR has prepared for him in this binder  
12 because of the age of this case, and so there's an answer he  
13 didn't know the answer to. He didn't say yes or no. He said I  
14 don't know the answer to it. And subsequently NCR prepares an  
15 answer to a request to admit, which is what we have in front of  
16 us, and they have specifically taken a position, and they have  
17 denied that they encouraged or facilitated the recycling of  
18 CCP.

19 The response to 37 is otherwise proper. You can admit  
20 a request to admit in part and deny it in part. And they have  
21 done that. So I find 37 is okay.

22 MR. EVEN: And, Your Honor, unless Mr. Nyffeler  
23 objects, I think the exact same thing goes for 38 and 39, which  
24 are essentially the same request with a change in the year.

25 MR. NYFFELER: Your Honor, I will concede that

1 Mr. Even is right. I still question Mr. Even's position that  
2 it's okay that his witness wasn't prepared for the deposition  
3 when he told us that he was.

4 THE COURT: And that motion is not before me.

5 37, 38, and 39 are okay. Which is the conclusion I  
6 came to subject to hearing your arguments before we came into  
7 court this morning.

8 52.

9 MR. NYFFELER: Okay, Your Honor. In 52 we ask, "Admit  
10 that, prior to 1971, NCR conducted experiments on carbonless  
11 copy paper that included the simulation of paper recycling."  
12 "NCR admits that the documents admitted in evidence at the  
13 Phase 1 trial as Trial Exhibits 1253, 1290, and 1295 describe  
14 certain research performed by NCR Paper Research. These  
15 documents, however, do not support the other allegations in  
16 Request for Admission Number 52, including that NCR conducted  
17 experiments on carbonless copy paper that included the  
18 "simulation" of paper recycling." And the response continues.  
19 I won't go on.

20 This comes back again, Your Honor, that the witness  
21 same forward -- sorry, first of all. NCR in its responses  
22 identified these three documents: 1253, 1290 and 1295. GP did  
23 not identify these ahead of time for them. They came up with  
24 these on their own. And when we tried to figure out, tried to  
25 figure out why NCR included these documents in their response,

1 we asked the witness, we put Exhibit 1253 before him, and he  
2 said -- sorry.

3 THE COURT: Again, we're getting off into examining  
4 whether the witness was adequate at a 30(b)(6) deposition.

5 MR. NYFFELER: No. Go ahead.

6 THE COURT: I'm having a hard time addressing that  
7 issue because that's really -- first of all, there isn't a  
8 motion to compel the deposition of a 30(b)(6) witness or to  
9 test the sufficiency of the answers of a 30(b)(6) witness, or  
10 anything like that. We have a single motion, it's limited to  
11 testing the sufficiency of the answers to requests to admit.  
12 And while it can be helpful to get the context of these  
13 requests to admit, I'm not going to rule on the sufficiency of  
14 these answers based on what a 30(b)(6) witness said or didn't  
15 say. The requests and their answers stand on their own.

16 MR. NYFFELER: Yes. But, Your Honor, they still have  
17 to respond in good faith, and how better can we determine their  
18 good faith in the response than to ask NCR itself.

19 THE COURT: To the extent that you're testing  
20 truthfulness and good faith and so forth, isn't that an issue  
21 that is reserved for trial normally?

22 MR. NYFFELER: The cases, the Asea case determined  
23 that it wasn't. They determined that the thing was admitted  
24 because their response was not made in good faith. They did  
25 not have a good faith basis to give the answer that he did. I

1 mean this is the problem, Your Honor.

2 THE COURT: Well, I think there's some authority that  
3 suggests that this is not the time to test the good faith and  
4 the truthfulness of the answers and to test veracity. So those  
5 are issues for trial. Foretich versus Chung at 151 Federal  
6 Rule Decision, District of Columbia, 1993 is a case on point.

7 But what we are being required to do here, all of us,  
8 is to try to determine good faith by looking into evidentiary  
9 matters that are best reserved for trial. The same as if we  
10 tried to test the veracity of the witness's statements. I  
11 think that's why these things are best left to trial. In fact,  
12 these motions can be left under the rule for a later date and  
13 for trial. And that carve out in the normal scheme of things,  
14 whether this type of motion, is because of that. I don't think  
15 we're going to do that in this instance, but that's the problem  
16 that arises when you try to look behind the answers that they  
17 give and test the sufficiency of whether or not they're telling  
18 the truth and whether they can support their answers.

19 MR. NYFFELER: Well, Your Honor, it's not a test, it's  
20 not a question of truth. The question is whether it's  
21 contested or not. And it is true that after the trial is over,  
22 we can then determine whether it was proper for them to deny or  
23 questions that they should have admitted. However, that's, I  
24 would argue that is not what we're talking about here today.  
25 They gave, they gave an answer that their witness said -- they

1 did not have a good faith basis to give that answer. It's  
2 simply a matter of, I don't want to admit this so I'm not going  
3 to, even though the evidence is staring me in my face and I  
4 have nothing against it. So I mean -- so I guess the question  
5 then is if they don't have to respond in good faith, then why  
6 do we have requests for admission? They will just deny  
7 everything, everything that's damaging to them.

8 THE COURT: Well, it's not that they don't have to  
9 deny or, pardon me, that they don't have to respond in good  
10 faith. It's a matter of when the issue of good faith is  
11 resolved.

12 MR. NYFFELER: Right. And the Ninth Circuit in the  
13 Asea case did it before trial because it was determined based  
14 on the evidence in the case that in fact they could have  
15 responded but didn't. Their response was not in good faith.  
16 They simply didn't want to.

17 THE COURT: Counsel.

18 MR. EVEN: I don't think that Asea case or Asea case  
19 stands for what counsel proposes it stands for. That case  
20 pertained to somebody who said, we conducted a search, a  
21 reasonable search, and the court said, well, the Court of  
22 Appeals said, if after an evidentiary hearing on that issue  
23 there is proof that you lied about that, then that may be a  
24 grounds to deem something admitted. That is very different  
25 from having an evidentiary issue now about the issues that are

1 in this case, which is what they're trying to do. They are  
2 trying to say, we have the better of the evidence on issue X or  
3 issue Y. We have a different view of the evidence, and we, you  
4 know, obviously we can have an evidentiary, can hold an  
5 evidentiary hearing about this. I just don't think this is the  
6 proper venue or the proper time for this. These are RFAs, they  
7 are supposed to be something that narrows issues that are  
8 essentially undisputed or cannot reasonably be disputed, and  
9 these issues are disputed. They call it a simulation, we don't  
10 think it's a simulation. There is some evidence, and a court  
11 one day, if this is a question that actually matters, we will  
12 have to decide that. I'm not sure it is. But we'll get to  
13 that one day next September.

14 But we're not there yet. For now, I think for, that  
15 goes. And just for clarity, I think the same goes for 52, 53,  
16 54, 55, and 63, at least. We've clearly denied all of these.  
17 And instead of just saying denied as the rule requires, we have  
18 qualified the denial and say yeah, we acknowledge that there  
19 are certain documents that pertain to things that are somewhat  
20 relevant to this, and instead of, instead of essentially  
21 accepting the fact that we gave more than is required, they're  
22 coming to this court and saying, well, because they said that,  
23 that's somehow improper. No, we are allowed to qualify our  
24 denials if we are aware of a piece of evidence that goes one  
25 way or another, and we have acknowledged that. We are still

1 denying these. And that's a proper denial.

2 THE COURT: You mention -- and I'll let you speak in  
3 a little. You mentioned a number of other requests besides 52.  
4 What were they?

5 MR. EVEN: It's at least 53, 54, 5.

6 THE COURT: That's not at issue, I don't think.

7 MR. EVEN: 53, 55, 56, 57, and I believe 63.

8 MR. NYFFELER: If I may, Your Honor. I think you have  
9 the complete set in this little group, 52, 53, 55 through 60,  
10 and 63.

11 THE COURT: Counsel, you may respond. If these are  
12 all -- my notes indicated a similarity with all of these.

13 MR. NYFFELER: Your Honor, they are all similar, the  
14 ones that I just read off.

15 THE COURT: All right. Any other arguments as to  
16 these then?

17 MR. NYFFELER: Well, two things. First of all, when,  
18 when the case law that NCR cites, the Taylor case, stands for  
19 the proposition that if NCR simply wants to deny only, they are  
20 able to do that. And then at the end of trial we would have a  
21 hearing to determine whether they should have denied or not.  
22 But what they have just said now is that we went beyond denial  
23 and we actually qualified our answers. Rule 36 says, if you're  
24 going to qualify your answer you have to have a good faith  
25 basis for doing it. And we conducted an evidentiary

1 investigation by deposing their 30(b)(6) witness to figure out  
2 what that good faith was based on, why it needed to be  
3 qualified, and the witnesses don't have an answer. The  
4 witness, he could not identify any basis that would suggest a  
5 good faith basis.

6 Also, with respect to 52 specifically, the issue there  
7 is they identify these three documents. Now, we asked them why  
8 they identified these documents and the witness didn't know.  
9 We tried, we put one of the documents in front of the witness  
10 and asked him, does this, what does this show? And he was  
11 unable to even understand what the document said. He said,  
12 it's -- okay: Question: Would you agree with me that the  
13 research described in 1253 includes experiments on carbonless  
14 copy paper that included the simulation of paper recycling?  
15 Answer: I'm not sure. I see where it says -- it's hard to  
16 read this handwriting, but -- question or -- It's an acquired  
17 skill. Answer: I see the word CB broke in here. I don't know  
18 if it's in the context of recycling or not. I don't know.  
19 Question: You don't know one way or the other? Answer: No."

20 So look, Your Honor, they cite three documents but  
21 they can't tell us why it's there. If the documents support  
22 the requests that we ask, then they should admit. If the  
23 documents illustrate the fact that they, that the request is  
24 incorrect, then they should just deny. But what we have now is  
25 that they admit the documents exist, they won't tell us why

1       they cite them, they can't explain them, and then they say we  
2       deny the remainder, the remaining allegations.

3               So I, I don't understand how they can say good faith  
4       that they can deny it when they don't even understand the  
5       documents in front of them. I mean, look, I should be clearer.  
6       If they had simply just denied everything here, we wouldn't be  
7       here today. Because what we're talking about is whether they  
8       had a good faith basis to qualify their responses. And that's  
9       what we searched it and that's where we are at.

10              MR. EVEN: I think --

11              THE COURT: Go ahead.

12              MR. EVEN: I think --

13              THE COURT: No good deed goes undone.

14              MR. EVEN: Exactly. Not to count the multiple notions  
15       that NCR somewhat acted without good faith here. NCR  
16       absolutely acted with good faith. The only reason we did not  
17       supply a simple denial is because they did ask for a 30(b)(6)  
18       and we did want to provide them with some context and some  
19       understanding of the reasons of why we deny, and that which we  
20       are denying. That does not mean that we now should be deemed  
21       admitting those things that we are denying. The witness  
22       certainly did not say, actually, yeah, you're right. This is  
23       admitted. I would admit it. That's not what the witness said.

24              And so if they have an issue with what the witness  
25       said, that may be an issue, as Your Honor suggested, for a

1 different motion. I don't think they should have. The  
2 witness, what they failed to mention is that the witness first  
3 and foremost directed them to the piece of paper before him  
4 with supplemental responses that said, these, this is our  
5 position. And I just can't add to that because everything that  
6 I know is in here and that's just as I said, a result of the  
7 posture of this case. And counsel for Georgia-Pacific  
8 continued to ask, and so he answered what he answered. But at  
9 the end of the day, they now have even additional reasons that  
10 clearly show the good faith reasons for why we included any  
11 specific thing, because we think it somehow pertained to the  
12 question, and that's what we provided.

13 But that doesn't change a denial to an admission.

14 THE COURT: The witness directed them to the  
15 supplemental responses that were filed at the same day as the  
16 deposition?

17 MR. EVEN: Yes. Just before the deposition began.

18 THE COURT: And --

19 MR. NYFFELER: Read that, Your Honor, if you want  
20 that.

21 MR. EVEN: And to the extent they were unhappy with  
22 those, we have filed a supplemental response that provides  
23 further --

24 THE COURT: Did that first supplemental group of  
25 answers state that, that NCR was aware of any additional facts

1 supporting or refuting the witness's testimony. And that was  
2 why he couldn't provide any other answers?

3 MR. NYFFELER: Your Honor, it didn't mention anything  
4 about a search. It didn't mention anything about any other  
5 information. It just pointed to the documents and said NCR  
6 denies the remaining allegations and request number 52 with no  
7 further explanation.

8 THE COURT: Well, I probably would have been well  
9 advised to use the magic words, but it seems to me that  
10 everybody was aware at that time that what he was providing was  
11 based on evidence assembled by a team of attorneys from NCR  
12 that had gathered this evidence over, from a period of some  
13 40 years ago, put it in a binder and had him look at the binder  
14 and then familiarize himself with that information and told him  
15 to be prepared to vocalize that as the 30(b)(6) witness's  
16 responses on behalf of NCR. It doesn't seem to me anybody at  
17 that deposition probably thought of him as having any more  
18 personal knowledge than what had been assembled. And that's  
19 what he was limited to. Which as a practical matter was what  
20 NCR was limited to. I doubt anybody was misled.

21 Certainly NCR has more articulately answered these in  
22 its second supplemental answers. I'm going to hold that 52, 3,  
23 5, 6, 7, and 60 -- 58, I'm sorry, 59 and 60 and 63 which are  
24 all designed the same, are adequately answered. You have your  
25 record.

1 Motion is denied.

2 I think that saves us coming back this afternoon or  
3 tomorrow morning. The other motion we talked about Friday  
4 disappeared by way of stipulation. I commend the parties on  
5 being able to reach an agreement.

6 There are two other 30(b)(6) motions outstanding which  
7 I'm working on. I thought I was catching up to you fellows but  
8 I was told when I was outside yet another motion had just been  
9 filed which has just been referred to me as well.

10 So you're staying ahead of me. All right. Thank you  
11 very much.

12 MR. EVEN: Thank you, Your Honor.

13 MR. NYFFELER: Thank you, Your Honor.

14 THE CLERK: All rise, please. Court is adjourned.

15 (Proceedings concluded, 12:04 p.m.)  
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## C E R T I F I C A T E

I certify that the foregoing is a transcript from the Liberty Court Recording System digital recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

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